Samsuri bin Saad & Anor v Chew Kit Toh (t/a Kit Thong Woh Hup) and another appeal

HIGH COURT (TAIPING) — CIVIL APPEAL NOS 12-24-93(T) AND 12-25-93(T)
ABDUL MALIK ISHAK J
8 FEBRUARY 1995

Civil Procedure *— Appeal — Memorandum of — Memorandum of appeal incorporated into record of appeal — Whether memorandum served — Effect of failure to serve memorandum — Rules of the High Court 1980 O 55 r 2*

Damages *(Personal Injuries or Death) — Action for — Recovery of damages — Both deceased and respondents equally blameworthy — Whether innocent victim entitled to recover 100% against respondents*

Damages *(Personal Injuries or Death) — Fatal accident — Dependency claim — Apportionment of liability — Findings of sessions court judge — Whether appellate court judge may interfere — Deceased found to be 50% blameworthy — Whether father of deceased entitled to recover 100% damages — Civil Law Act 1956 s 7*

The first appellant's (A's) son ('the deceased') died in a road accident involving a motor cycle and a lorry. The deceased was the rider of the motor cycle and the second appellant (B), who sustained serious injuries, was the pillion rider. The lorry driver was the respondent (C). A made a dependency claim under s 7 of the Civil Law Act 1956. In the sessions court the judge found that the deceased and the driver of the lorry were equally liable but went on to hold that, as far as quantum of damages was concerned, C was liable to pay 100% to A and B. All parties appealed. The issues in both appeals revolved around quantum and liability. In the first appeal, A and B contended that C was entirely blameworthy and accordingly liability should not be apportioned. In the second appeal, C contended that B was not entitled to recover 100% against C as the sessions court judge had found that both the deceased and C were equally blameworthy. A further issue raised on the question of damages was whether A, as the father of the deceased, would be entitled to recover 100% damages even though the deceased was found to be 50% negligent. In the second appeal, A and B raised a preliminary objection to the effect that the memorandum of appeal was never served on them but was incorporated in the record of appeal contrary to O 55 r 2 of the Rules of the High Court 1980 ('the RHC').

Held, dismissing the appeals:

(1) The memorandum of appeal does not form part of the appeal record and should accordingly be filed separately. The second appeal would therefore be dismissed (see pp 580F–H); *Sobri bin Hasan v Ramalingam* [1993] 3 CLJ 70 and *Siang Galau v Ang Wak Hiong* [1994] 1 CLJ 82 followed.

(2) The appellate court should be slow in interfering with the apportionment of liability if it is satisfied that there is no error of law or of fact in the judgment of the trial judge. In the instant case the apportionment of liability on equal basis between the parties was correctly arrived at by the sessions court judge (see p 583B–D); *Uval & Anor v Zainal* [1970] 1 MLJ 74 followed.

(3) On the question of quantum of damages, an appellate court will not interfere simply because the figures awarded by the trial judge was greater or less than that which the appellate court would itself have awarded. It is only when the trial judge has acted on a wrong principle of law or has misapprehended the facts or made a wrong estimate of the damage would the appellate court be entitled to interfere. In the present case the awards were fair and reasonable — the sessions court judge had considered all the authorities advanced before her and had arrived at the figures correctly (see p 583D–G); *Lim Joo Chiang v Lim Siew Choo & Anor* [1955] MLJ 201 followed.

(4) An innocent third party like B is entitled to recover the whole of the damages (100%) notwithstanding the finding that the deceased and C were equally blameworthy. It is sufficient for B to prove negligence against C even if it was not the whole negligence (see p 584A–B); *Reliance Omnibus Co Sdn Bhd & Anor v Ishak bin Mohd Jaafar & Anor* [1993] 4 CLJ 291 and *Oli Mohamed v Keith Murphy & Anor* [1969] 2 MLJ 244 followed.

(5) The position would be the same for A, the father of the deceased, who made a dependency claim under s 7 of the Civil Law Act 1956. He was not at fault and had no share of the responsibility of the blame. He would be entitled to 100% damages even though the deceased was found to be 50% blameworthy (see p 585G); *Veronica Joseph (F), An Infant & Anor (by Cyril Augustus Joseph, their Next Friend) v Tu Kon Lin & Anor* [1987] 1 CLJ 81 followed.

[Bahasa Malaysia summary

Anak lelaki perayu pertama (A) ('si mati') telah meninggal dunia dalam suatu kemalangan jalanraya yang melibatkan subuah motosikal dan sebuah lori. Si mati adalah penunggang motorsikal itu dan perayu kedua, yang mengalami cedera parah, adalah pembonceng. Pemandu lori adalah penentang (C). A membuat suatu tuntutan tanggungan di bawah s 7 Akta Undang-Undang Sivil 1956. Hakim mahkamah sesyen mendapati bahawa si mati dan pemandu lori sama-sama patut dipersalahkan tetapi seterusnya memutuskan bahawa, setakat mana kuantum ganti rugi adalah berkenaan, C adalah bertanggungan untuk membayar 100% kepada A and B. Kesemua pihak membuat rayuan. Isu dalam kedua-dua rayuan berkisar pada liabiliti dan kuantum ganti rugi. Dalam rayuan pertama, A dan B berhujah bahawa C adalah bersalah pada keseluruhannya dan ekoran

itu, liabiliti tidak patut diagihkan. Dalam rayuan kedua, C berhujah bahawa B adalah tidak berhak untuk mendapatkan 100% gantirugi daripada C kerana hakim mahkamah sesyen telah mendapati bahawa si mati dan C were adalah sama-sama bersalah. Satu lagi isu yang timbul yang berkenaan dengan soal ganti rugi ialah sama ada A, sebagai bapa si mati, berhak memperolehi 100% ganti rugi walaupun si mati didapati 50% cuai. Dalam rayuan kedua, A dan B mambangkitkan satu bantahan permulaan bahawa memorandum rayuan tidak disampaikan kepada mereka tetapi dimasukkan di dalam rekod rayuan, bertentangan dengan A 55 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

Diputuskan, menolak kedua-dua rayuan itu:

(1) Memorandum rayuan tidak membentuk sebahagian daripada rekod rayuan dan patut oleh itu difailkan secara berasingan. Oleh itu, rayuan kedua patut ditolak (lihat ms 580F–H); *Sobri bin Hasan v Ramalingam* [1993] 3 CLJ 70 dan *Siang Galau v Ang Wak Hiong* [1994] 1 CLJ 82 diikut.

(2) Mahkamah rayuan harus elakkan diri daripada bercampur tangan dengan pengagihan liabiliti jika ia berpuas hati bahawa tidak terdapat kesilapan undang-undang atau fakta dalam penghakiman hakim perbicaraan. Dalam kes ini, pengagihan liabiliti atas asas 50%:50% antara pihak-pihak telah dicapai dengan betul oleh hakim mahkamah sesyen (lihat ms 583B–D); *Uval & Anor v Zainal* [1970] 1 MLJ 74 diikut.

(3) Berkenaan dengan soal kuantum ganti rugi, sebuah mahkamah rayuan tidak akan bercampur tangan semata-mata kerana jumlah yang diaward oleh hakim perbicaraan adalah lebih atau kurang daripada apa yang akan diaward oleh mahkamah rayuan sendiri. Cuma apabila hakim perbicaraan telah bertindak atas prinsip undang-undang yang salah atau telah memahami fakta-fakta dengan salah atau telah membuat satu jangkaan yang salah tentang kerosakan, barulah mahkamah rayun berhak bercampur tangan. Dalam kes ini award yang dibuat adalah adil dan munasabah — hakim mahkamah sesyen telah mempertimbangkan semua autoriti-autoriti yang dikemukakan kepadanya dan telah mencapai jumlah-jumlah itu dengan beul (lihat ms 583D–G); *Lim Joo Chiang v Lim Siew Choo & Anor* [1955] MLJ 201 diikut.

(4) Satu pihak ketiga seperti B yang tidak bersalah berhak memperolehi keseluruhan ganti rugi (100%) tanpa mengira dapatan bahawa si mati dan C sama-sama patut dipersalahkan. Adalah mencukupi untuk B membuktikan kecuaian terhadap C walaupun bukan keseluruhan kecuaian itu (lihat ms 584A,B); *Reliance Omnibus Co Sdn Bhd & Anor v Ishak bin Mohd Jaafar & Anor* [1993] 4 CLJ 291 dan *Oli Mohamed v Keith Murphy & Anor* [1969] 2 MLJ 244 diikut.

(5) Kedudukan adalah sama untuk A, bapa si mati, yang membuat tuntutan tanggungan ini di bawah s 7 Akta Undang-Undang

A Sivil 1956. Dia tidak bersalah dan tidak bertanggung jawab atas kesalahan itu. Dia berhak mendapat 100% ganti rugi sungguhpun si mati didapati 50% bersalah (lihat ms 585G); *Veronica Joseph (F), An Infant & Anor (by Cyril Augustus Joseph, their Next Friend) v Tu Kon Lin & Anor* [1987] 1 CLJ 81 diikut; *Lim Chai Oon & Anor v Normah bte Ismail (Widow) Suing on Behalf of Herself and Seven Minors as Dependants of Fadzin bin Abu & Anor* [1994] 2 CLJ 783 diikut.]

B

Notes

C For cases on the service of the memorandum of appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 511–524.

For cases on dependency claims, see 6 *Mallal's Digest* (4th Ed) paras 267–268.

Cases referred to

D *Amar Singh v Chin Kiew* [1960] MLJ 77
Bong Nyi Mooi v Narayanasamy & Anor [1973] 1 MLJ 250
Jeremiah v Lee Yew Kwai [1966] 1 MLJ 59
Lew Voon Kong & Anor v Mustaffa bin Kamis [1978] 1 MLJ 217
Lim Chai Oon & Anor v Normah bte Ismail (Widow) Suing on Behalf of Herself and Seven Minors as Dependants of Fadzin bin Abu & Anor [1994] 2 CLJ 783

E

Lim Joo Chiang v Lim Siew Choo & Anor [1955] MLJ 201
Miskinah bte Jaya & Ors v Mohamed bin Salleh & Anor [1984] 1 MLJ 187
Mohamed Salleh bin Awang & Anor v Low Han Leong & Anor [1982] 1 MLJ 82

F

Oli Mohamed v Keith Murphy & Anor [1969] 2 MLJ 244
Reliance Omnibus Co Sdn Bhd & Anor v Ishak bin Mohd Jaafar & Anor [1993] 4 CLJ 291
Siang Galau v Ang Wak Hiong [1994] 1 CLJ 82

G

Siti Aisha bte Ibrahim v Goh Cheng Hwai [1982] 2 MLJ 124
Sobri bin Hasan v Ramalingam [1993] 1 MLJ 263, [1993] 3 CLJ 70
Topaiwah v Salleh [1968] 1 MLJ 284
Uval & Anor v Zainal [1970] 1 MLJ 74
Veronica Joseph (F), An Infant & Anor (by Cyril Augustus Joseph, their Next Friend) v Tu Kon Lin & Anor [1987] 1 CLJ 81

H

Legislation referred to

Civil Law Act 1956 s 7, s 12(4)
Rules of the High Court 1980 O 2 r 1, O 55 r 2

I *Su Ching* (*Gurdev Dalgit Su & Co*) for the appellants.
Saiful Bahari bin Hj Omar (*Ruslan & Zamani*) for the respondents.

Abdul Malik Ishak J: Both these two appeals were heard together as agreed between both parties. It is patently clear from the appeal records

that these two appeals arose out of the same accident involving the same vehicles and the same parties.

At the outset, Madam Su Ching, the learned counsel for both the respondents in Civil Appeal No 12–25–93(T), raised a preliminary objection to the effect that the memorandum of appeal was never served on them but instead they were incorporated in the record of appeal and formed part and parcel of the record of appeal contrary to O 55 r 2 of the Rules of the High Court 1980 ('the RHC'). Encik Saiful Bahari bin Haji Omar, the learned counsel for the appellants in Civil Appeal No 12–25–93(T), resisted and argued that an irregularity of this nature was curable under O 2 r 1 of the RHC. Madam Su Ching informed the court that she took the liberty of informing the appellants of her intention to raise the preliminary objection by way of an oral notice and this was effected 48 hrs before this appeal came up for hearing. She argued that ample notice had been provided and yet there was no application filed by the appellants for enlargement of time. Even though Encik Saiful Bahari bin Hj Omar admitted that the oral notice adverted to by Madam Su Ching was relayed to them, yet he fashioned his arguments on the inherent jurisdiction of this court to enlarge time, notwithstanding that there was no formal application, and he urged this court to allow the appeal to proceed on its merits. I need to refer to two authorities that would sufficiently dispose of the preliminary objection. First, it is the case of *Shobri bin Hasan v Ramalingam* [1993] 3 CLJ 70, [1993] 1 MLJ 263 where the court held (see the headnote from [1993] 3 CLJ 70):

> (1) The memorandum of appeal does not form part of the appeal record. The memorandum of appeal must be filed separately within 14 days after the service on the appellant's solicitor, of the notes of evidence and the grounds of judgment by the Subordinate Courts and served on the respondent.
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> (2) As the memorandum of appeal was not filed within the prescribed time, and no sufficient ground is shown for the delay (O 55 r 4 (3) of the Rules of the High Court 1980) and as there is no application for enlargement of time to file the memorandum of appeal, the preliminary objection stands.

Secondly, it is the case of *Siang Galau v Ang Wak Hiong* [1994] 1 CLJ 82 where Chong Siew Fai J (now Chief Judge, Sabah and Sarawak) applied the same principles as enunciated in *Sobri*'s case and consequently, his Lordship there then proceeded to dismiss the appeal with costs. Applying these two authorities to the present appeal, I am impelled to hold that there was substance in the preliminary objection as advanced by Madam Su Ching and, accordingly, I dismissed the appeal in regard to the Civil Appeal No 12–25–93 (T) forthwith with costs without the need to go into the merits of the appeal.

Now, in regard to Civil Appeal No 12–24–93(T), the learned sessions court judge proceeded to hold that both the deceased rider of motor cycle KS 5917 (Osman bin Samsuri) and the respondents as the driver of motor lorry ABG 8794 were equally liable. But notwithstanding that both the

parties were held equally liable, the learned sessions court judge ordered that the respondents were held liable to pay, as far as the quantum was concerned, 100% to the appellants and this must be the sore point that the respondents kept in their hearts. I shall revert to this part later.

Hereinafter, all references to the parties would relate and be confined to Civil Appeal No 12–24–93(T).

This was a dependency claim under s 7 of the Civil Law Act 1956 by the first appellant and his wife, Bedah bte Abdullah, for the death of their son by the name of Osman bin Samsuri ('the deceased') in a road accident that took place on 7 May 1991 at about 2.30 pm at km 65, along the stretch of Ipoh-Penang road. The second appellant who rode pillion on that motor cycle sustained serious injuries, pain and suffering together with the antecedent losses. It is pertinent to point out that the learned sessions court judge in her written judgment had amply considered the issues of liability and quantum generally.

The second appellant and the investigating officer of the case gave evidence and it was through them that the jigsaw puzzle as to how the accident could have taken place was pieced together. The respondents were absent throughout the trial and it is obvious that the learned sessions court judge relied heavily on the evidence of the second appellant and the investigating officer of the case.

The second appellant testified that he rode pillion on that motor cycle which was ridden by the deceased from the direction of Ipoh towards Taiping and they were using the stretch of the old main road from Ipoh to Penang (not the PLUS highway). As they approached km 65, near the Bukit Berapit area, suddenly a motor lorry came from the opposite direction, encroached onto their path and collided into the motor cycle that was still in motion then. That motor lorry was none other than the motor lorry driven by the respondents. The second appellant further testified that the motor cycle was travelling along that stretch about 2 feet away from the side of the road; and that when the motor lorry encroached onto the path of the motor cycle the distance between the two vehicles were approximately 10 metres. It is germane, at this juncture, to mention that the appellants in their pleadings categorically alleged encroachment by the respondents. This certainly augurs well for the appellants. The particulars of negligence against the driver of the motor lorry at paragraph 'f' alleged in cogent terms: 'memasuk atau melintas laluan pihak plaintif' (see *Lew Voon Kong & Anor v Mustaffa bin Kamis* [1978] 1 MLJ 217 FC; *Siti Aisha bte Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124 FC and *Miskinah bte Jaya & Ors v Mohamed bin Salleh & Anor* [1984] 1 MLJ 187). Reverting back to the facts of the case, the second appellant testified that the deceased could not avoid the collision as the 'tembok terowong sempit'. Indeed looking at the photographs at page 27 B, C, the narrowness of the 'terowong' can really be appreciated (see the additional record of appeal). Under cross-examination, the second appellant testified that, at the material time, the motor cycle was going down the slope while the motor lorry was on its way up the slope and that the accident occurred after bypassing the 'tembok terowong'.

The investigating officer testified as to the condition of the road at km 65, Jalan Ipoh to Pulau Pinang stretch at the old main road. He testified that if one travels from Ipoh one would go down the slope and negotiate the curves. He testified that at the scene there were scratch marks at 'J' as reflected in the sketch plan. A

The learned sessions court judge relied on the silent evidence which took the form of the rough sketch plan and the key together with the photographs in order to assess the liability of the parties. These silent evidence were used as barometers by the learned sessions court judge, apart from relying on the testimonies of the second appellant and the investigating officer of the case, to draw inferences as to who was in fact liable (see *Mohamed Salleh bin Awang & Anor v Low Han Leong & Anor* [1982] 1 MLJ 82 FC). This was a perfectly legitimate exercise. B C

There were several findings of facts by the learned sessions court judge and for convenience it can be summarized as follows:

(1) She noted the scratch mark at 'J' as reflected in the sketch plan and she concluded that that scratch mark which started near the centre white line must have been the point of impact of the two vehicles. And here if one were to trace backwards from point 'J' following the same line of the scratch mark, the point of impact would be nearer to the centre double white line. D

(2) She stated that since it was not disputed that the deceased was travelling down the slope and at a speed of 15 to 25 miles per hour down that slope, she concluded that the deceased might not have been able to control his motor cycle — all the more so as there was a pillion rider with him. Given this scenario, she concluded that as the deceased rode the motor cycle down the slope and negotiated the right turning he lost control of his motor cycle causing his motor cycle to glance off the motor lorry (tergesel) which was, at that time, travelling near the centre white line. The impact must have caused the motor cycle to lurch forward as it was descending down the slope and this must have caused the scratch mark that appeared on the road as reflected at 'J'. She concluded that this was the probable cause of the accident in view of the absence of broken glass on the road. E F G

(3) She surmised further that since the motor lorry was ascending the slope it must have travelled slowly as compared to the motor cycle that went down the slope. Based on these facts, she concluded that it was more probable that the deceased must have sped whilst going downhill and negotiating the right turn and, in so doing, the motor cycle came into contact with the motor lorry in a glancing blow. H

(4) Finally, she concluded that the accident would not have happened had both parties been more cautious. She put liability equally on the shoulders of the deceased and the driver of the motor lorry for manoeuvring the vehicles too close to the centre of the road nearer to the centre double white line. I

A Confronted with these findings of facts by the learned sessions court judge, I am reluctant to interfere on the apportionment of liability as it was purely a question of deciding what was the right apportionment of the blame between the deceased as the rider of that motor cycle and the driver of the motor lorry when they were involved in a road accident (see *Jeremiah v Lee Yew Kwai* [1966] 1 MLJ 59). It is now trite that in an B appellate capacity, I must be slow to interfere with the apportionment of blame as I am fully satisfied that there was no error of law or of fact in the impeccable judgment of the learned sessions court judge (see *Uval & Anor v Zainal* [1970] 1 MLJ 74). It has been said that an appellate court should not interfere with the findings of the trial court judge who had the C opportunity of seeing and hearing the witnesses and who made, in the context of the present appeal, her findings thereon (see *Bong Nyi Mooi v Narayanasamy & Anor* [1973] 1 MLJ 250). These principles of law when applied to the present appeal would mean only one thing. The apportionment of liability on equal basis between the parties was correctly arrived at by the learned sessions court judge and it is now left for me to D confirm it and I so do.

On the question of quantum of damages, on the authority of *Lim Joo Chiang v Lim Siew Choo & Anor* [1955] MLJ 201 (PC), an appellate court will not interfere simply because the figures awarded by the trial judge was greater or less than that which the appellate court would itself have E awarded. Put differently, quantifying damages is solely a matter of opinion or of impression that varies from one individual to another. In all cases, differences of calculation or assessment are to be expected and are, indeed, common place. That would be the sum total of judicial discretion. Consequently, an appellate court will not substitute its own figure simply because they disagree with the figures arrived at by the trial judge. It is only F when the trial judge had acted on a wrong principle of law or has misapprehended the facts or made a wrong estimate of the damage suffered would the appellate court be entitled to interfere. None of these appear to be apparent in the judgment of the learned sessions court judge (see *Amar Singh v Chin Kiew* [1960] MLJ 77 at p 79 and *Topaiwah v Salleh* [1968] G 1 MLJ 284 for a good treatment of the subject matter). In my judgment, the awards given are fair and reasonable considering previous awards for similar injuries. The learned sessions court judge considered all the authorities that were advanced before her and came to those figures correctly and I am not inclined to interfere. But that is not the end of the matter. It was argued before me that the second appellant as the pillion H rider was not entitled to recover 100% against the respondents as the learned sessions court judge had found that both the deceased rider of the motor cycle and the driver of the motor lorry were equally blameworthy. It was argued that the decision of Wan Yahya J (now FCJ) in *Veronica Joseph (F), An Infant & Anor (by Cyril Augustus Joseph, their Next Friend)* I *v Tu Kon Lin & Anor* [1987] 1 CLJ 81 was no longer good law in view of the decision of James Foong J in *Lim Chai Oon & Anor v Normah bte Ismail (Widow) Suing on Behalf of Herself and Seven Minors as Dependants of Fadzin bin Abu & Anor* [1994] 2 CLJ 783. I have, in regard to an innocent

third party, the pillion rider, like the second appellant here observed in *Reliance Omnibus Co Sdn Bhd & Anor v Ishak bin Mohd Jaafar & Anor* [1993] 4 CLJ 291 at p 295 to the effect that:

> As regards the second respondent/plaintiff, an innocent third party (a pillion rider), she is entitled, in my considered view, to recover the whole of the damages in this case. It is sufficient for her to prove negligence against the second appellant/defendant even if it is not the whole of the negligence. She is entitled to recover the whole of the damages (100%) awarded by the trial Court notwithstanding my judgment in the instant appeal that the first respondent/plaintiff and the second appellant/defendant were equally negligent. It is her prerogative whether to recover the whole of the damages (100%) against the appellants/defendants or against the first respondent/plaintiff (see *Oli Mohamed v Keith Murphy & Anor* [1969] 2 MLJ 244 and *Wong Fook @ Wong Fong & Anor v Abdul Shukor bin Abdul Halim & Anor* [1990] 2 CLJ 382). On the other hand, the first respondent/plaintiff is entitled to recover partly from his own insurance company and partly from the second appellant/defendant for the damages incurred by him.

In *Oli Mohamed v Keith Murphy & Anor* [1969] 2 MLJ 244 at p 245, Choor Singh J dealt with the right of an innocent third party to recover damages in this way:

> Counsel for the second defendant submitted that if the court holds that both defendants were equally negligent, then the judgment against the second defendant should be only for 50 per cent of the total sum assessed as damages in this case. In my opinion this submission also fails. It is clear law that if each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the whole damage. See *Dingle v Associated Newspapers Ltd* [1961] 2 QB 162 and *Drinkwater v Kimber* [1932] 2 QB 281. In *Dingle*'s case, Devlin LJ said at p 188:
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> > '... Where injury has been done to the plaintiff and the injury is indivisible, any tortfeasor whose act has been a proximate cause of the injury must compensate for the whole of it. As between the plaintiff and the defendant it is immaterial that there are others whose acts also have been a cause of the injury and it does not matter whether those others have or have not a good defence. These factors would be relevant in a claim between tortfeasors for contribution, but the plaintiff is not concerned with that; he can obtain judgment for total compensation from anyone whose act has been a cause of his injury. If there are more than one of such persons, it is immaterial to the plaintiff whether they are joint tortfeasors or not. If four men, acting severally and not in concert, strike the plaintiff one after another and as a result of his injuries he suffers shock and is detained in hospital and loses a month's wages, each wrongdoer is liable to compensate for the whole loss of earnings. If there were four distinct physical injuries, each man would be liable only for the consequences peculiar to the injury he inflicted, but in the example I have given the loss of earnings is one injury caused in part by all four defendants. It is essential for this purpose that the loss should be one and indivisible; whether it is so or not is a matter of fact and not a matter of law ...'

That would be the right of the second appellant in so far as the quantum goes. Would the position be the same for the first appellant whose son, the deceased, had died in the road accident and that the first appellant now proceed to claim on a dependency claim under s 7 of the Civil Law Act 1956?

Bluntly put, would the first appellant be entitled to 100% damages just like the second appellant even though the deceased (the first appellant's late son) was found 50% negligent? Wan Yahya J (now FCJ) in *Veronica Joseph* held the view that the claimants there were entitled to 100% damages notwithstanding that the deceased there was 20% liable. The headnote of *Veronica Joseph* reads as follows:

> (1) Considering the circumstances and the evidence of the case, the deceased was liable to 20% contributory negligence.
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> (2) In a claim for dependency, the sum awarded to the plaintiffs can be reduced in proportion to the contributory negligence, but this will only apply where the action was brought for the benefit of the estate under section 8 of the Act and not under section 7 as in the present case.

His Lordship Wan Yahya J said this in *Veronica Joseph* at p 88:

> The claimants in our present case, are the children; the contributory negligence was that of their mother. They have not been at fault themselves and therefore have no share of the responsibility for the damages. Their claim is for damages suffered as dependants and they cannot be classified as persons who have suffered damages 'as a result partly of their own fault' within the meaning of Section 12(1) of the Civil Law Act 1956.

James Foong J took an opposite view and in *Lim Chai Oon*'s case he differentiated *Veronica Joseph*'s case and was of the view that since s 12(4) of the Civil Law Act 1956 states that in an action brought by a dependant under s 7 of the Act, damages recoverable by the dependant shall be reduced proportionately to the extent of the deceased's fault in the accident, namely, 50%.

It is wrong to say that *Lim Chai Oon*'s case overruled *Veronica Joseph*'s case as both these two cases were decided by the High Courts of concurrent jurisdictions. For my part, I prefer *Veronica Joseph*. The reason is simple. The first appellant was not at fault and he has no share of the responsibility for the blame and, consequently, he too is entitled to 100% damages.

For the reasons adumbrated above, I dismissed the appeals in regard to the liability and the quantum of damages as arrived at by the learned sessions court judge with costs.

Order accordingly.

Reported by Kenneth Goh